In the Supreme Court
OF THE
United States

OCTOBER TERM 1945

No.

COUNTY OF MARIN, STATE OF CALIFORNIA,
Petitioner,

vs.

JAMES S. PEDROTTI, also known as STEPHEN PEDROTTI, MARLYN PEDROTTI, MRS. ANGIE MINER, now known as ANGIE BOLTZ, MRS. RUBY BRIEN, MRS. KATHERINE COBB, SAM PEDROTTI, MRS. EUNICE BAUCHERO, MRS. JULIA ESTELLE BEAUREGARD, MRS. MAE GHISLETTO, RALPH PEDROTTI, MRS. BEATRICE M. CAPUCETTI, MRS. ERNESTINE B. PRONINI, GUSSIE K. PEDROTTI, now known as GUSSIE K. GRAHAM, MRS. SANTINA CERINI, MRS. SAVINA CERINI, MRS. EVA PEDROTTI and MARTIN PEDROTTI,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

A reference to the official report of the opinion of the Circuit Court of Appeals (R. 294) is set forth in the petition, (p. 4). That reference is adopted here.

II.

STATEMENT OF JURISDICTION.

A concise statement of the grounds on which the jurisdiction of this court is invoked is given in the petition (p. 5), and, by reference thereto, is adopted here.

III.

CONCISE STATEMENT OF THE CASE.

A summary of the matter involved is given in the petition (p. 2). To avoid duplication, that statement is incorporated herein as a concise statement of the case.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified in the petition as the questions presented and numbered 1-4, (p. 4), all of which are specifically assigned as error.

V.

SUMMARY OF ARGUMENT.

1. The Circuit Court of Appeals erred in holding that the respondents, at the time of the taking by condemnation, had an interest in the property of a compensable value.

2. The Circuit Court of Appeals erred in holding that the testator intended the word "sale" to be synonymous with "convey" and to include a taking by condemnation.

3. The Circuit Court erred in holding that the *cy pres* doctrine could not be applied to the facts found to exist and the trust be thus preserved.

4. The Circuit Court erred in holding that the respondents, and not the petitioner, were entitled to receive the condemnation award.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE RESPONDENTS AT THE TIME OF THE TAKING BY CONDEMNATION, HAD AN INTEREST IN THE PROPERTY OF A COMPENSABLE VALUE.

Attention is called to the fact that, at the time of the filing of the complaint for condemnation and the declaration of taking, the fee title to the property was in the petitioner, *County of Marin,* and the respondents (Pedrotti heirs) had no interest in the property other than a possibility of reverter in the event the petitioner should sell or mortgage, or attempt to sell or mortgage, the property.

QUERY: *Was that possibility of reverter an estate of compensable value?* The trial court concluded that it was not (R. 46). The Circuit Court concluded that it was (R. 293); in fact that it had a compensable value equal to the value of the fee title. In this the Circuit Court erred.

The rule is well stated in the *American Law Institute, Restatement of the Law of Property,* Section 53, Comment b (page 604, 47 Fed. Supp.,) as follows:

> "If, viewed from the time of the commencement of an eminent domain proceeding, and not taking into account

> any changes in the use of the land sought to be condemned which may result as a consequence of such proceeding, the event upon which a possessory estate in fee simple defeasible is to end is an event the occurrence of which, within a reasonably short period of time, is not probable, then the damages for a taking thereof by an eminent domain proceeding are ascertained as though the estate were a possessory estate in fee simple absolute and the entire amount thereof is awarded to the owner of the estate in fee simple defeasible. Under these circumstances the future interest has no ascertainable value. *It is immaterial whether the event upon which the possessory estate in fee simple defeasible is to end is related to the use of the land in question or is unrelated thereto.*"

This rule has received uncontradicted application in Courts of Appeal, both state and federal. Thus in *Romero Vs. Department of Public Works,* 17 Cal. (2d) 189, (Supreme Court, Calif.) certain lands had been conveyed to a railroad company for one dollar, plus benefits to be derived from the construction and operation of a railroad, the deed containing a condition that the land should be used only for railroad purposes and in the event the railroad company should fail to use it for railroad purposes, the land to revert to the heirs of the grantor. The railroad company used the land for railroad purposes for forty years. Then the State of California condemned sixty feet of the right of way for highway purposes and the question arose as to who was entitled to the award. The California Supreme Court, in holding that the railroad company and not the heirs of the grantor were entitled to the award, said:

> "When the state in the condemnation proceeding acquired the title to the 60 foot strip for highway purposes it thereby prevented its use for railroad purposes. As to so much of said property, the condition that it should be used

for railroad purposes became impossible of further performance by operation of law. In other words, the public necessity for highway purposes as to that portion which was conclusively established in the condemnation proceeding, prevented further performance of the condition. *The authorities generally are to the effect that the owner of the possibility of a reverter prior to a breach of the condition is not entitled to compensation when the property is taken under the law of eminent domain. Such cases hold that the possibility of voluntary abandonment by non-user is so remote and improbable that it has no substantial value to be estimated in a condemnation proceeding.* They recognize, however, that the owner of the fee or the reversionary interest should have a separate valuation of his interest where the land taken has some special value to him, as where the underlying lands are shown to be mineral bearing or otherwise of value separately from the use of the surface of the land; but that otherwise the law will not take notice of the separate value of the fee and of the user where there is no substantial difference in their values, and *if, in such case, at the time fixed for the valuation the reversion has not occurred, the reversionary interest is said not to have any compensable value in a condemnation proceeding. (Southern Pac. R. Co. v. San Francisco Sav. Union,* 146 Cal. 290 (79 Pac. 961, 106 Am. St. Rep. 36, 2 Ann Cas. 962, 70 L. R. A. 221); *City of San Gabriel v. Pacific Elec. Ry. Co.,* 129 Cal. App. 460 (18 Pac. (2d) 996); *Lutes v. Louisville & Nashville Railroad Co.,* 158 Ky. 259 (164 S. W. 792); *Nichols, Eminent Domain,* 2d. ed., vol. 1, p. 243; *see, also, Lyford v. City of Laconia,* 75 N. H. 220 (72 Atl. 1085, 139 Am. St. Rep. 680, 22 L. R. A. (N. S.) 1062)." (Underscoring ours).

The same rule was applied in *U. S. vs. 16 acres of land (Dist. Ct. Mass.)* 47 Fed. Supp. 603, where the testator devised land to a city for park purposes, with a proviso for reverter should the

city use the land "for other than park purposes" and the United States thereafter took the property in condemnation proceedings.

The rule was also applied in *U. S. vs. 1119.15 acres of land (Dist. Ct. E. D. of Ill.)* 44 Fed. Supp. 449, where land was deeded to school trustees for school purposes with a proviso for reverter in the event it was otherwise used and the land was thereafter condemned by the United States.

The rule was also applied in *People of Puerto Rico Vs. United States, et al.,* (1 Circ.) 132, Fed. (2d) 220, cert. den. 319 U. S. 752; 63 S. C. 1165. There the People of Puerto Rico, ceded certain public lands to the Casino de Puerto Rico, a local corporation, upon condition that they would be "used only for non profit purposes; as a social center and recreation park annexed thereto" and with a provision for reversion if used for other purposes. Thereafter the United States condemned the property and deposited its value, $135,000, in the Registry of the Court. The People of Puerto Rico claimed the award, as did the Casino corporation. The District Court granted the award to the corporation and the Circuit Court 1 Circ. affirmed that decision and in its opinion stated:

> "The sole question before us is whether or not the People of Puerto Rico, at the time of the taking, also had a compensable interest in the property, which interest the taking damaged or destroyed. Undoubtedly the People of Puerto Rico had an interest in the land in question at the time of its condemnation. Whether that interest was a right of re-entry for condition broken, or a conditional reversion, or a possibility of reverter, or something else, we need not inquire, because, whatever its technical name, the only right which the People had up to the time when the land was condemned was the right to the land in fee simple if at some indefinite time in the future the

Casino should violate any one of the conditions or provisos upon which its right of present occupancy was made to depend. And this right of the People of Puerto Rico was destroyed by the condemnation. But, the question remains: What was the value of that right?"

"We are aware of no rational means by which to determine the value of the possibility that at some indefinite time in the future the land might revert to the People of Puerto Rico. All that can be done is to venture a guess, and it is elementary law that damages cannot be assessed by mere guesswork. In Lyford v. Laconia, 75 N. H. 220, 226, 72 A. 1085, 1089, 22 L. R. A., N. S., 1062, 139 Am. St. Rep. 680, the court said in speaking of a similar interest that 'There was no method by which the value of the interest could be assessed which would rise above the dignity of a guess', and in Chandler v. Jamaica P. A. Corporation, 125 Mass. 544, 547, it was said that the 'possibility of interest is too remote and contingent to be the subject of an estimate of damages by a jury'. See, also, First Reformed Dutch Church v. Croswell, 210 App. Div. 294, 206 N. Y. S. 132; Joint School District No. 1, Town of Greenfield v. Bosch, 219 Wis. 181, 262 N. W. 618; United States v. 1119.15 acres of land, D. C., 44 F. Supp. 449; United States v. 2,086 Acres of Land, D. C., 46 F. Supp. 411; and also 1 Am. Law Inst. Restatement of Property § 53, comment (b) and illustrations thereunder.

"The cases cited above are all in accord and are all squarely in point. We believe their reasoning to be sound. If Lancaster School District v. Lancaster, 295 Pa. 112, 144 A. 901, (see 29 Columbia Law Review 674), relied upon by the appellant, holds to the contrary we decline to follow it.

"The judgment of the District Court is affirmed."

The rule has been also followed, although on different facts,

in *Beard's Erie Basin, Inc., vs. People of New York,* 2 Circ. 142 Fed. (2d) 487.

In the case at bar, there is no evidence whatsoever from which even an inference could be drawn that the County of Marin intended to sell or mortgage, or to attempt to sell or mortgage the property in question had it not been condemned. Hence the reversionary interest of the heirs of the testator was so remote and uncertain that it had no compensable value and the Circuit Court erred in awarding the respondents the full value of the fee.

No reason has been suggested, and none appears in the opinion of the Circuit Court, why this well established rule is not applicable to the instant case. In fact the Circuit Court entirely ignored it, although the issue was raised both by supplemental briefs and by petition for rehearing.

It is respectfully urged that the decision of the Circuit Court, 9 Circ. in the case at bar is contrary to and in conflict with decisions of the Circuit Courts of Appeal, First Circuit and Second Circuit and Courts of Appeal of the States of California, Kentucky, New Hampshire, Massachusetts, New York and Wisconsin, and hence that the application for a writ of certiorari should be allowed.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE TESTATOR INTENDED THE WORD "SALE" TO BE SYNONYMOUS WITH "CONVEY" AND TO INCLUDE A TAKING BY CONDEMNATION.

In its opinion, the Circuit Court concludes:

"There is ample authority for appellants' contention that a transfer of property by eminent domain is a 'sale'."

This unqualified conclusion permits of but one interpretation, viz: that the Circuit Court concluded and held that a taking by condemnation is a "sale" for all purposes, in the legal as well as in the ordinary sense.

> "A sale, in legal nomenclature, is a term of precise legal import, both at law and in equity, and has a well defined legal signification, and has been said to mean, at all times, *a contract between parties* to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."
>
> 55 C. J. 36 Sec. 1
>
> "A sale of goods is an *agreement* whereby the seller transfers the property in goods to the buyer for a consideration called the price."
>
> *Uniform Sale Act, Sec. 1, Sub.* 2.

That "sale", both in its legal and in its ordinary sense means a *contract*, or a meeting of the minds, is so fundamental as to require no extensive citation of authorities. And there exists in a condemnation proceeding no element of contract and no meeting of minds. In fact, if a contract or meeting of minds is possible, no condemnation is necessary because the public agency purchases the property at the agreed price. In truth and in fact a condemnation is a taking or appropriation of property by a sovereign power, for public use and without the owner's consent.

Scott Vs. Toledo, (C C) 36 Fed. 385.

True, as stated by the Circuit Court, there is ample authority that a transfer of property by eminent domain is a "sale", or

will be deemed such but only for limited purposes and when consistent with intent of the user of the term and no injust results therefrom. The Circuit Court, in its opinion, (R. 299) cites a number of decisions wherein it has been so held. A review of those authorities herein would appear to be of little value inasmuch as they throw no light on the intention of the testator, which must control.

That the testator did not intend the word "sale" to include a taking by eminent domain is clearly apparent from the following observations:

(a) The will (R. 98) was dated August 24th, 1929, before Hamilton Field, a military airport, was conceived or constructed. The land involved was a 263 acre dairy ranch, isolated from residential or industrial development. To contend that the deceased foresaw the possibility that thirteen years thereafter this nation would be engaged in a great war and would be condemning ranch acreage, including his own, for the construction of numerous air fields, would be to attribute to him supernatural powers.

(b) If the testator intended "sale" to include a taking by condemnation, he would not have made provision for the reversion *of the land* to his heirs in the event of "sale" or "attempted sale". For such a reversion became impossible after condemnation.

(c) If the testator intended "sale" to include condemnation, he would have made provision for the disposition of the condemnation award.

(d) If the testator intended to provide for a reversion in the event of condemnation, he could have so stated by the use of simple language.

The Circuit Court apparently recognized that the testator never contemplated a taking of the property by condemnation, for in its opinion it states:

> "We think the testator meant 'convey' and that he used the term 'sale' or 'mortgage' because at the time of making his will a 'sale' or 'mortgage' was the conceivable means by which the county might dispose of the property."

The Circuit Court, concluded that the primary purpose of the testator was to preserve his home ranch as a memorial to his deceased wife and that the creation of the charitable trust was but incidental, and must fail because the primary purpose had become impossible of fulfillment. Upon what evidence that conclusion was reached does not appear. There is no evidence whatsoever in the record tending to disclose the intent of the testator other than the will itself. The terms of the will are as consistent with the conclusion that the testator intended primarily to create a trust for the benefit of the blind and crippled who were *bona fide residents of the County of Marin*, the community where he had long resided and prospered considerably, and that it was a mere incident that his home ranch was available as the corpus of the trust and that he saw fit to create the trust in memoriam of his deceased wife.

Assuming, as concluded by the Circuit Court, that the testator did intend "sale" to mean "convey", it does not follow that the taking by condemnation was sufficient to cause a reversion to the Pedrotti heirs.

For the will provided (R. 98) that:

> " . . . in the event *that the said County of Marin should sell*. . . . then it shall forfeit all rights to said property, and said property shall revert, etc."

It required the County of Marin to become an affirmative actor, to "sell" or to "convey" before a forfeiture would be worked and a reversion result. And the uncontradicted evidence is, and the trial court found (R. 58) that the County of Marin played a negative part in the condemnation proceedings. If the condemnation was a sale, it was a sale by operation of law and not by the County of Marin.

The decision of the Circuit Court in this regard is in direct conflict with *State Vs. Federal Square Corporation,* 89 N. H. 538, 3 Atl. (2d) 109 which is fully discussed herein in Argument III.

And so too, if the testator intended "sale" to mean "convey", still he specifically prohibited a conveyance only by the County of Marin, and in the condemnation proceedings the County did not convey. That too was done by operation of law.

III.

THE CIRCUIT COURT ERRED IN HOLDING THAT THE CY PRES DOCTRINE COULD NOT BE APPLIED TO THE FACTS FOUND TO EXIST AND THE TRUST BE THUS PRESERVED.

In its opinion the Circuit Court states:

> "We have no quarrel with the principle of cy pres to continue the charity in the next best way if the precise method prescribed becomes impossible of fulfillment – if the intent of the testator were clear and as interpreted by the lower court. That is, if it were clear from the will that the intention of the testator was that his property should be applied to a charitable purpose *in any event,* we could apply the cy pres doctrine in order that such general charitable intent not be defeated. However, here it is

not clear that the testator intended to create a general charitable trust."

A decision very similar in facts and very much in point is *State v. Federal Square Corporation,* supra. Briefly, the facts there were that one Fowler deeded to the City of Concord certain lands, together with the buildings thereon and the furnishings therein, to be used as a free public library. The grant provided not only for the specific use of the land and buildings, but also that certain rooms therein should be given specific names and used for specific purposes, and that over specified doors there was to be inscribed:

> *"This building was presented to the City of Concord, October 18, 1888, by William P. Fowler and Clara M. Fowler, in grateful and loving remembrance of their parents, Asa Fowler and Mary C. K. Fowler, for fifty years residents of Concord, and always active promoters of the educational and intellectual advancement of its citizens,"* and *"The Fowler Library Building".*

The deed further provided that in the event the land or building were ever used for any other purpose, or if any other conditions were broken, the property was to revert to the grantor's heirs.

The premises were accepted by the City and used as directed until the State of New Hampshire condemned them for the erection of a state house.

The heirs of the donor contended a reversion had occurred and claimed the award. The trial court applied the cy pres doctrine and directed that the entire award be paid to the City, in trust for library purposes, and the heirs appealed.

The Supreme Court of New Hampshire sustained the trial court, holding that the donor intended a reversion to result,

only if the city, *voluntarily* used the property for other than library purposes and that the cy pres doctrine should be applied to preserve the trust for purposes as nearly consistent with the intent of the donor as was possible.

The facts in *State vs. Federal Square Corporation, supra* are so identical and the entire opinion is so applicable to the case at bar, that a partial quotation from the decision would be inadequate. Rather than quote the entire opinion herein, the same is called to the Court's attention in confidence that it will be given thorough consideration.

The Court's attention is also called to the case of *In re Wilkey's Estate*, 337 Penn. 129, 10 Atl. (2d) 425, which is equally compelling to the conclusion that the condemnation of the land devised should not result in a reversion of the award to the heirs and that the cy pres doctrine should be applied to preserve the trust. Briefly, the facts were that the testator bequeathed the residue of her estate to the Presbyterian Church, for the specific purpose of building a church on the land "which has been the home of my family for generations", the church to be known as the "Wilkey Memorial Presbyterian Church". The will directed the type of architecture to be followed in the construction of the church, and that certain stone taken from the family farm house should be worked into the new structure; also that the entire plot be used for a church and the dwelling next door as a manse for the use of the pastors.

Shortly after the death of the testatrix and before her wishes could be carried out, the land was taken by eminent domain for school purposes. The heirs of the testatrix claimed the award but the trial court awarded it to the church trustees, to be used for the erection of a church at a location about seven city squares removed from the location designated by the testatrix, the

church to be known by the same name. The heirs appealed and the Supreme Court of Pennsylvania sustained the trial court, stating:

> " . . . . In applying the principle of cy pres the court does not arbitrarily substitute its own judgment for the desire of the testator, or supply a fictional testamentary intent, but, on the contrary, it seeks to ascertain and carry out as nearly as may be the testator's true intention; in so doing it assumes that where a particular purpose is apparently not an essential feature of his plan, the testator would prefer that his property should be applied to a purpose as similar as possible to that stated by him rather than that the trust which he attempted to create should fail altogether. Perhaps the best enunciation of the doctrine is that contained in Restatement, Trusts, section 399: 'If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settler manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settler.' Or, as tersely stated in City of Philadelphia v. Heirs of Stephen Girard, 45 Pa. 9, 27, 28: 'The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention.'
>
> "Cases are not infrequent in which the physical location of the edifice or institution provided for in a charitable trust has been held to be of secondary importance in comparison with the general purpose for which the erection

> of the building or the carrying on of the charitable activity was designed. Illustrations in our own state are: Avery v. Home for Orphans of Odd Fellows of Pennsylvania, 228 Pa. 58, 77 A. 241; In re Kramph's Estate, 228 Pa. 445, 461-463, 77 A. 814; In re Mear's Estate, 299 Pa. 217, 149 A. 157; In re Curran's Estate, 310 Pa. 434, 165 A. 842."

The decision of the Circuit Court in the case at bar is in direct conflict with the decision of the Supreme Court of New Hampshire in *State Vs. Federal Square Corporation,* supra, and the decision of the Supreme Court of Pennsylvania in *In re Wilkey's Estate, supra,* yet the Circuit Court made no attempt to reconcile its decision with those cases, although they had been cited and extensively quoted in the briefs.

The Circuit Court, in its opinion (R. 297) did conclude that the primary purpose of the testator was to preserve his home ranch as a memorial to his wife, and hence the *cy pres* doctrine could not be applied. Can it be said that the donor in *State vs. Federal Square Corporation, supra,* had any less purpose of preserving the building he designed, furnished and donated in memory of his deceased parents; or that the testatrix in *In re Wilkey's Estate,* supra, had a less purpose of preserving the property which had been her family home for generations (since the days of William Penn as stated by the court) as a memorial to herself? In both the two cited cases and in the case at bar, the grantor or testator intended to accomplish three purposes, viz: (1) The preservation of specific property, (2) as a memorial, and (3) for specific charitable purposes. In each instance the fulfillment of all three purposes became impossible because of the condemnation of the property. In the two cited cases the courts wisely and justly applied the cy pres doctrine to give effect to two of the purposes, viz: the creation

of a memorial and for benefit of the specified charity. The same result will be accomplished in the case at bar if the decision of the trial court is affirmed. A Henrietta Pedrotti Memorial Fund will be created and the income from that fund will be used for the aid of the crippled and blind needy residents of Marin County. Only the preservation of the home ranch has become impossible and need fail.

On the other hand, if the decision of the Circuit Court is permitted to stand, all three purposes must fail. There will be no preservation of the home ranch, no memorial to the deceased wife and no charitable trust. Rather, there will result an unintended and inequitable windfall to the respondents, all of whom are nephews and nieces of the testator (R. 96).

IV.

THE CIRCUIT COURT ERRED IN HOLDING THAT THE RESPONDENTS AND NOT THE PETITIONER, WERE ENTITLED TO RECEIVE THE CONDEMNATION AWARD.

(a) The decision of the Circuit Court insofar as it held that the respondents had a compensable interest in the property at the time it was taken by condemnation is in direct conflict with *Romero Vs. Department of Public Works, supra, People of Puerto Rico vs. United States, supra,* and related cases cited in this brief.

(b) The decision of the Circuit Court, insofar as it holds that the testator intended the word "sale" to include a taking by condemnation, is in conflict with *State Vs. Federal Square Corporation, supra,* and is wholly unsupported by the evidence.

(c) The decision of the Circuit Court, insofar as it holds that the cy pres doctrine may not be applied to preserve the

trust created by the testator, is in conflict with *State Vs. Federal Square Corporation, supra,* and *In re Wilkey's Estate, supra.*

Petitioner respectfully urges that a writ of certiorari be issued.

Respectfully submitted,

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